241 F.Supp.2d 111

United States District Court,
D. New Hampshire.

GARY and Sylvie S., individually and on behalf of their son, Andrew S.
v.
MANCHESTER SCHOOL DISTRICT

No. 02-004-B.

Jan. 16, 2003.

Parents of disabled child brought action against school district, challenging determination by administrative officer that child was not entitled to hearing regarding his special education benefits due to his enrollment in private school. On the parties' cross-motions for summary judgment, the District Court, Barbadoro, J., held that: (1) child's inability to obtain hearing did not violate his constitutional rights to substantive and procedural due process, equal protection, and free exercise of religion, and (2) state special education law did not give student individually enforceable right to obtain public educational services.

Defendant's motion granted.

West Headnotes

[1] Schools k148(2.1)
345k148(2.1)

Disabled child who has been placed by his parents in private school does not have individually enforceable right to receive special education and related services; rather, local school

district need only spend proportional amount of its total Individuals with Disabilities Education Act (IDEA) funding on provision of services to disabled students in private school. Individuals with Disabilities Education Act, § 612(a)(10), 20 U.S.C.A. § 1412(a)(10); 34 C.F.R. § 300.453(a).

[2] Constitutional Law k278.5(7)
92k278.5(7)

[2] Schools k155.5(1)
345k155.5(1)

Inability of disabled child enrolled in private school to obtain hearing regarding his individualized education plan (IEP) did not violate his substantive due process rights under Fourteenth Amendment, since provisions of Individuals with Disabilities Education Act (IDEA) denying such hearing did not have intent or effect of penalizing private school students; child, as private school student, did not have individually enforceable right to obtain public special education services, and provisions at issue did not significantly threaten parents' right to control child's education. U.S.C.A. Const.Amend. 14; Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.

[3] Constitutional Law k242.2(5.1)
92k242.2(5.1)

[3] Schools k155.5(1)
345k155.5(1)

Inability of disabled child enrolled in private school to obtain public hearing regarding his individualized education plan (IEP) under Individuals with Disabilities Education Act (IDEA) did not violate his equal protection rights under

Fourteenth Amendment, since congressional decision not to subsidize exercise of right to education by denying such hearing to private school students did not infringe on child's fundamental rights. U.S.C.A. Const.Amend. 14; Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.

[4] Constitutional Law k277(1)
92k277(1)

[4] Schools k155.5(1)
345k155.5(1)

Disabled child enrolled in private school who was denied public hearing regarding his individualized education plan (IEP) under Individuals with Disabilities Education Act (IDEA) did not have protectable property interest in such hearing, as required to maintain procedural due process claim under Fourteenth Amendment or state special education law, since child did not have individually enforceable right to obtain special education services. U.S.C.A. Const.Amend. 14; Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.; N.H.RSA 186-C:1 et seq.

[5] Constitutional Law k84.1
92k84.1

In order to pass muster under Free Exercise Clause of First Amendment, law ordinarily need not be justified by compelling interest if it is "neutral," in that it is not targeted at religiously motivated conduct, and "generally applicable," in that it does not selectively burden religious conduct. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law k84.5(3)
92k84.5(3)

[6] Schools k155.5(1)
345k155.5(1)

Inability of disabled child enrolled in private school to obtain public hearing regarding his individualized education plan (IEP) under Individuals with Disabilities Education Act (IDEA) did not violate his right to free exercise of religion, as would violate First Amendment, since IDEA was neutral law of general applicability, and free exercise challenge was not joined with another independently viable constitutional claim. U.S.C.A. Const.Amend. 1; Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.

[7] Civil Rights k1060
78k1060
(Formerly 78k127.1)

Inability of disabled child enrolled in private school to obtain public hearing regarding his individualized education plan (IEP) under Individuals with Disabilities Education Act (IDEA) did not substantially burden child's ability to practice his faith, as would violate Religious Freedom Restoration Act (RFRA), since child's faith did not require attendance of sectarian school. Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.; Religious Freedom Restoration Act, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

[8] Schools k155.5(1)
345k155.5(1)

Inability of disabled child enrolled in private school to obtain public hearing regarding his individualized education plan (IEP) under Individuals with Disabilities Education Act (IDEA) did not violate state special education law, since

statute did not give child individually enforceable right to obtain public educational services; although statute provided disabled students with entitlement to attend "approved program" to implement their IEPs, it did not state whether local school district satisfied such entitlement by offering special education services to its disabled children in public or private school setting. Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.; N.H.RSA 186-C:7, 186-C:9.

***113** Scott F. Johnson, Stein Volinsky & Callaghan, Concord, NH, for Plaintiff.

Dean B. Eggert, Wadleigh Starr & Peters, Manchester, NH, for Defendant.

MEMORANDUM AND ORDER

BARBADORO, Chief Judge.

Andrew S. is a disabled child who attends a Catholic elementary school but receives special education services from the Manchester School District pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (2000 & Supp.2001) and New Hampshire's Special Education Law, N.H.Rev.Stat. Ann. 186-C. Andrew's parents sought a hearing before the New Hampshire Department of Education after becoming dissatisfied with the services Andrew was receiving. A hearing officer denied their request because he determined that neither the IDEA nor the Special Education Law entitle the parents of a disabled child to a hearing unless their child is enrolled in public school.

Andrew's parents accept the hearing officer's interpretation of the IDEA. Nevertheless, they argue that the Act: (1) impermissibly burdens their right to send Andrew to private

school in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses; (2) denies them a suitable forum in which to litigate their dispute in violation of their Fourteenth Amendment right to procedural due process; and (3) penalizes them for their decision to send their child to a religious school in violation of the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C.2000bb *et seq.* (1994 & Supp.2002). They also argue that they are entitled to a hearing under the Special Education Law even if their challenges to the IDEA are unavailing.

The matter is before me on cross-motions for summary judgment. I address the parties' arguments by first describing the differences in the way in which federal and state law treat disabled children who attend public and private school. I then briefly describe the facts of the case and analyze each claim in turn.

I.

A. *The IDEA*

The IDEA is a federal grant program under which a state's eligibility to receive funds is conditioned upon its adoption of laws and regulations that make a "free appropriate public education" available to the state's disabled children. 20 U.S.C. § 1412(a)(1). The Act defines a "free appropriate public education" as "special education and related services that--(A) have been provided at public expense, under public supervision and direction and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program required under Section 1414(d) of this title." 20 U.S.C. § 1401(8). "Special Education" is "specially designed

instruction" designed to "meet the unique needs of the child," 20 U.S.C. § 1401(25), and "related services" includes transportation and other supportive services that may be required to assist the child in deriving benefit from ***114** special education services. 20 U.S.C. § 1401(22).

The parents of a disabled student are entitled to an "impartial due process hearing" to challenge a local school district's compliance with the IDEA's free appropriate public education requirement. *See* 20 U.S.C. § 1415(f); 34 C.F.R. § 300.507. The right to a due process hearing includes the rights to (1) have an attorney attend the hearing; (2) present evidence and cross-examine witnesses; (3) require the local school district to disclose expert evaluations; (4) require the state to produce a written or electronic verbatim record of the hearing; and (5) require the hearing officer to produce a written or electronic decision that includes findings of fact. *See* 20 U.S.C. § 1415(f)(2), (h).

Until Congress enacted the Individuals with Disabilities Education Act Amendments of 1997 ("the 1997 Amendments"), Pub L. No. 105-17 (1997), the law was unclear as to whether a participating state's statutory duty to make a free appropriate public education available to its disabled students entitled disabled students voluntarily placed in private school to an individually enforceable right to receive services. [FN1] Before the IDEA was amended, it provided only that participating states must assure that, "[t]o the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services ..." 20 U.S.C. § 1413(a)(4)(A)(1996). Some courts construed this provision to give disabled students in private school an

individually enforceable right to comparable benefits. *See, e.g., Peter v. Wedl,* 155 F.3d 992, 1000-01 (8th Cir.1998). Other courts held that the IDEA did not require a local school district to provide comparable benefits if the agency had offered the student a free appropriate education in a public school setting. *See, e.g., K.R. v. Anderson Cmty. Sch. Corp.,* 81 F.3d 673, 680 (7th Cir.1996), *vacated and remanded for reconsideration in light of 1997 Amendments to IDEA,* 521 U.S. 1114, 117 S.Ct. 2502, 138 L.Ed.2d 1007 (1997), *and on remand,* 125 F.3d 1017 (7th Cir.1997) (reaffirming prior decision).

> FN1. A disabled child who has been placed in a private school by a local school district has the same substantive and procedural rights under the IDEA as a disabled child who has been enrolled by his parents in public school. *See* 20 U.S.C. § 1412(a)(10)(B)(i); 34 C.F.R. §§ 300.400-300.402. When I refer to disabled children in private school in this Memorandum and Order, I mean only children who have been voluntarily enrolled in private school by their parents.

[1] The 1997 Amendments resolved uncertainty surrounding the issue by adding language stating that the IDEA

> does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. 1412(a)(10)(C)(i). In light of this provision, it is now beyond reasonable dispute that a disabled child who has been placed by his parents in a private school does not have an individually enforceable right to receive special education and related services. *See K.R.,* 125 F.3d at 1019. Instead, a local school district need only spend a proportional amount of

its total ***115** IDEA funding on the provision of services to disabled students in private school. *See* 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. § 300.453(a).

Because a disabled student in private school does not have an individually enforceable right to receive special education and related services, the IDEA does not give the child's parents a corresponding right to an impartial due process hearing. [FN2] *See* 34 C.F.R. § 300.457(a). Instead, states must adopt "state complaint" procedures for resolving complaints brought by the parents of disabled children in private school. *See* 34 C.F.R. §§ 300.457(c), 300.660. When a parent invokes the state complaint process, the state must: (1) conduct an on-site investigation; (2) give the parent an opportunity to submit additional evidence; (3) review all relevant information; and (4) issue a written decision with findings of fact. *See* 34 C.F.R. § 300.661. If the state determines that a complaint has merit, it must determine "[h]ow to remediate the denial of those services, including, as appropriate, the awarding of money reimbursement or other corrective action appropriate to the needs of the child." 34 C.F.R. § 300.660(b)(1). A parent may appeal an adverse ruling on a complaint to the New Hampshire Supreme Court. *See* N.H.Code Admin. R. Ann. Ed. 1127.04(C) (2001) ("[a]ny party who is aggrieved by the final written decision of the commissioner [resolving a state complaint] may appeal in accordance with Ed. 200"); Ed. 214.01 ("[a]ll appeals of the state board action shall be in accordance with RSA 541"); N.H.Rev.Stat. Ann. 541:6 (1997 & Supp.2002) ("applicant may appeal by petition to the Supreme Court").

> FN2. A disabled student in private school has a right to an impartial due process hearing to challenge a local school district's failure to properly identify,

locate, or evaluate the student. *See* 34 C.F.R. § 300.457(b). This entitlement is not at issue here.

B. *New Hampshire Law*

New Hampshire implements the IDEA through its Special Education Law. N.H.Rev.Stat. Ann. § 186-C. The Law requires local school districts to develop an individualized education plan ("IEP") [FN3] for every disabled student residing in the district. *See* N.H.Rev.Stat. Ann. § 186-C:7. It also provides that every disabled student "shall be entitled to attend an approved program which can implement the child's individualized education plan." N.H.Rev.Stat. Ann. § 186-C:9. An "approved program: is a program of special education that has been approved by the state board of education and that is monitored by a school district ... for the benefit of educationally disabled children ...." N.H.Rev.Stat. Ann. § 186-C:2-II. The parents of a disabled student are entitled "to appeal decisions of the school district regarding such child's individualized education plan as provided in rules adopted in accordance with RSA 541-A by the state board of education." N.H.Rev.Stat. Ann. § 186-C:7 II. It also states that "[a]ny action against a local school district seeking ***116** to enforce special education rights under state or federal law shall be commenced by requesting an administrative due process hearing ...." N.H.Rev.Stat. Ann. § 186-C:16-b-I. The law does not explicitly distinguish between disabled students in private school and disabled students in public school.

FN3. An IEP is identified in the Special Education Law as "a written plan for the education of an educationally disabled child that has been developed by a school district in accordance with rules adopted by the state board of education and that provides necessary special education or special education and educationally related services within an approved

program." N.H.Rev.Stat. Ann. § 186-C:2-III. The IDEA adopts a somewhat different definition of an IEP. *See* 20 U.S.C. §§ 1401(12); 1436. Moreover, the IDEA does not require a participating state to provide a disabled student in a private school with an IEP. *See* 34 C.F.R. § 300.341(a)(1). Instead, local educational agencies are required to prepare a less comprehensive "services plan" for such students. *See* 34 C.F.R. § 300.452(b).

The New Hampshire Department of Education has adopted by reference the federal regulations that pertain to the provision of special education services to disabled students in private school. *See* Ed. 1117.03. The state regulations thus make clear that disabled students in private schools and their parents (i) have no individually enforceable right under state law to receive services, (ii) are entitled only to an IEP that is consistent with what the IDEA characterizes as a "services plan;" and (iii) must use the state complaint process rather than the due process hearing process to raise any complaint concerning the adequacy of services. *See id.* These regulations became effective on July 1, 2001.

Prior to July 1, 2001, the Law's implementing regulations were less clear concerning the rights of disabled children in private school. They required local school districts to spend "the same average amount of IDEA program funds" for disabled students in public and private school unless "the average cost of meeting the needs of [disabled students in private school] is different from the average cost of meeting the needs of students enrolled in public schools," in which case, the district was required to spend "a different average amount of program benefits for private school students." Ed. 1117.04 (1996). The regulations also required local school districts to offer private school students benefits that were

comparable in "quality, scope and opportunity for participation." Ed. 1117.03 (1996).

The regulations authorized the parents of disabled children to file complaints with the Department concerning violations of either the IDEA or the Special Education Law and required the Department to investigate such complaints, issue written decisions, and take corrective action if warranted. *See* Ed. 1127.001- 1127.02 (1996). The regulations also established procedures for "Administrative Due Process Hearings" which authorized a parent of a disabled child to initiate a hearing to challenge "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." Ed. 1128.03(a)(1),(b)(1996). Finally, the regulations stated that "[t]he right of the parent to ... invoke due process procedures if the parent feels that [good faith efforts to assist the student in achieving the objectives and goals listed in the individualized education program] are not being made shall not be limited." Ed. 1109.10(c)(1996).

II.

Each year since 1997, Andrew's parents have met with a team of educators from the District to develop an IEP for Andrew for the upcoming school year. Andrew's IEPs for the 1999-2000 and 2000-01 school years specified that the District would provide him with one hour per week of speech and language services for the entire school year at a local public elementary school. The District also agreed to transport Andrew from and to his Catholic school so that he could receive the required services. Notwithstanding the District's agreements, Andrew did not receive any services in either year until October. Further, because the District failed to provide Andrew with reliable transportation, he missed an

additional 10 sessions and part of 5 others during the 2000-01 school year.

***117** To make up for the missed sessions, Andrew's parents attempted to secure the District's agreement to include compensatory education [FN4] in his IEP for the 2001-02 school year. On June 19, 2001, after the District refused this request and the parties were unable to agree on other aspects of the proposed IEP, Andrew's parents filed a complaint with the New Hampshire Department of Education and requested an impartial due process hearing. The District responded with a motion to dismiss arguing that because Andrew's parents had voluntarily enrolled him in private school, neither the IDEA nor the Special Education Law entitled them to a due process hearing. On September 7, 2001, the hearing officer assigned to the case agreed and granted the District's motion.

> FN4. Compensatory education is relief awarded under the IDEA to remedy past violations. *See Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 188 (1st Cir.1993).

Andrew's parents filed a state complaint with the New Hampshire Department of Education on October 17, 2001. While the state complaint was pending, they commenced this action challenging the hearing officer's denial of their request for a due process hearing. The Department of Education ultimately dismissed the state complaint on March 21, 2002. Andrew's parents elected to proceed with this action rather than seek judicial review of the denial of their state complaint in the New Hampshire Supreme Court.

III.

Andrew's parents present several arguments to support their claim that the IDEA's private school provisions are either are unconstitutional or violate RFRA. They also assert that they are entitled to a due process hearing under the Special Education Law. I begin by addressing their challenges to the IDEA. [FN5]

> FN5. The IDEA does not require states to deny a due process hearing to the parents of disabled children in private school. It merely permits states to do so without jeopardizing their ability to receive federal funds. The hearing officer's decision to deny Andrew's parents a hearing thus is necessarily based on New Hampshire's Special Education Law rather than the IDEA. Accordingly, the District might well have argued that Andrew's parents' challenges to the IDEA are unavailing because state law rather than federal law denies them a right to a hearing. I decline to dispose of plaintiffs' IDEA claims on this basis for two reasons. First, the District does not make this argument. Second, Andrew's parents would have redirected their constitutional challenges to the Special Education Law if I had denied them the opportunity to assert them with respect to the IDEA. Thus, I would have had to address the merits of their constitutional claims in an almost identical context even if I had declined to address their challenges to the IDEA.

A. *The IDEA*

1. Substantive Due Process

In *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the United States Supreme Court invalidated a state law that required parents to send

their children to public school. The Court reasoned that the law violated a parent's right under the Fourteenth Amendment's Due Process Clause to control her child's upbringing and education. *See id.* Andrew's parents rely on *Pierce* in arguing that the IDEA improperly conditions their ability to obtain a due process hearing on their agreement to surrender their fundamental right to enroll Andrew in private school. Because Andrew's parents do not base their substantive due process claim on the assumption that either state or federal law gives parents an entitlement to government funding for their children's education, I understand ***118** them to assert an "unconstitutional condition" claim. Such claims are generally made when government attempts to condition access to a government benefit on the relinquishment of a constitutional right.

The law of unconstitutional conditions is anything but clear. In certain contexts, the Supreme Court has condemned government attempts to condition the provision of a government benefit on a recipient's agreement to relinquish a constitutional right. *See, e.g., Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 549, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (federal funds for provision of legal services cannot be conditioned upon relinquishment of right to represent litigants in challenges to welfare laws); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (building permit cannot be conditioned upon relinquishment of unrelated property right); *FCC v. League of Women Voters of California,* 468 U.S. 364, 402, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (federal funds for non-commercial broadcasting stations cannot be conditioned on relinquishment of right to editorialize). On other occasions, for reasons that are difficult to discern given the above-cited precedents, the Court has declined to use the doctrine to invalidate selective subsidies that burden other constitutional rights. *See South Dakota v. Dole,* 483 U.S.

203, 209-210, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (federal funds may be conditioned on state's adoption of 21 year-old drinking age); *Rust v. Sullivan,* 500 U.S. 173, 196, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (federal funds for family planning service providers may be conditioned on relinquishment of right to engage in abortion counseling). This lack of clarity has sparked a rich body of academic writing that attempts to bring coherence to this difficult area of law. [FN6] I need not wade into this doctrinal quagmire to resolve this case, however, because both the Supreme Court and the First Circuit have consistently refused to invalidate laws which condition a parent's ability to obtain educational benefits on the parent's relinquishment of her right to send her child to private school. *See Norwood v. Harrison,* 413 U.S. 455, 462, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (*Pierce* "said nothing of any supposed right of private or parochial schools to share with public schools in state largesse on an equal basis or otherwise."); *Strout v. Albanese,* 178 F.3d 57, 66 (1st Cir.1999) ("fundamental right [to direct a child's upbringing and education] does not require the state to directly pay for a sectarian education"). *See also Harris v. McRae,* 448 U.S. 297, 318, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (dictum) ("It cannot be that because government may not ... prevent parents from sending their child to a private school ... government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to ... send their children to private schools."); *Maher v. Roe,* 432 U.S. 464, 477, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (dictum) ("*Pierce* casts no shadow over a state's power to favor public education by funding it ...").

FN6. *See, e.g.,* Mitchell N. Berman, *Conversion Without Baselines: Unconstitutional Conditions in Three Dimensions,* 90 Geo. L.Rev. 1 (2001); Lynn A. Baker, *The Prices of Rights: Toward a Positive*

Theory of Unconstitutional Conditions, 75 Cornell L.Rev. 1185, 1186 (1990); Cass R. Sustein, *Why the Unconstitutional Conditions Doctrine is an Anochronism (With Particular Reference to Religion, Speech and Abortion),* 70 BU L.Rev. 593 (1990); Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 Harv. L.Rev. 1413 (1989).

[2] Several factors lead me to conclude that this case fits comfortably within the above-cited precedents. First, while a different ***119** result might well be required if the evidence had indicated that Congress enacted the IDEA's private school provisions in an effort to penalize private school students, I find no support in the language, structure, or function of the IDEA for drawing such an inference. The IDEA does not categorically deny funding to parents who choose to enroll their children in private school. To the contrary, it requires local educational agencies to spend a proportional amount of their total IDEA funds on the provision of services to disabled students in private school. Rather than suggesting improper animus toward private school students, the IDEA's private school provisions more likely reflect the rational judgment that local school districts require significant flexibility in determining how to manage the limited funds that the federal government is willing to make available for the education of disabled children in private school. The specific provision that Andrew's parents challenge--the limitation on their right to a due process hearing--follows logically from the congressional determination that private school students do not have an individually enforceable right to obtain services. Since Andrew's parents have offered no countervailing evidence on this point, I decline to read into the IDEA a bias against private school students that does not appear to exist.

Second, the private school provisions do not significantly threaten a parent's right to control her child's education. The IDEA requires local school districts to spend a proportional amount of their IDEA funds on the education of disabled children in private school and it provides the parents of such children with a meaningful opportunity to challenge a local school district's actions by filing a state complaint. It is unlikely under such circumstances that many parents who would otherwise choose to enroll their children in private school would feel compelled to forgo that right merely because they would otherwise lose an individually enforceable right to services and the right to a due process hearing. Thus, the IDEA's private school provisions are not improperly coercive because they do not place undue pressure on a parent's right to send her child to private school.

Finally, it is significant that the condition imposed by the IDEA's private school provisions--relinquishment of the right to educate a child in private school--is closely related to the benefit at stake--an individually enforceable right to receive special education services and the ability to obtain a hearing challenging the adequacy of those services. If Congress had attempted to condition access to an educational subsidy on the relinquishment of an unrelated constitutional right, say the recipient's Fourth Amendment right to be free from unreasonable searches and seizures, I might well view the matter differently. Such a condition would likely be impermissible because it bears no relationship to the benefit at issue. This is not the case here. Accordingly, I am unpersuaded by Andrew's parents' substantive due process claim.

2. Equal Protection Clause

[3] Andrew's parents also rely on *Pierce* as the foundation for their Equal Protection Claim. Their argument is that: (1)

Pierce recognizes that parents have a fundamental right to educate their children in private schools; (2) infringements on fundamental rights must be justified by a compelling state interest; (3) the IDEA infringes the fundamental right of parents to place their children in private school by permitting states to deny them benefits that are available to the parents of children who attend public school; and (4) the ***120** infringement is not permissible because it does not serve a compelling state interest.

This argument fails because it erroneously assumes that government infringes a fundamental right when it refuses to subsidize that right. The Supreme Court rejected this assumption in *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), when it held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right and thus is not subject to strict scrutiny." To hold otherwise here would permit Andrew's parents to revive their moribund substantive due process claim by recharacterizing it as an equal protection challenge. This is not something that the Supreme Court precedent permits. *See Norwood,* 413 U.S. at 462, 93 S.Ct. 2804 ("It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause."). Accordingly, I reject plaintiffs' equal protection claim.

3. Procedural Due Process

[4] Andrew's parents argue that the IDEA violates their right to procedural due process because it does not require the Department of Education to give them a hearing on their challenge to the adequacy of Andrew's benefits. The short answer to this argument is that the due process clause does

not entitle them to a hearing because the IDEA does not give them a protectable property interest in the services that Andrew is receiving from the District. As I have already noted, the IDEA does not give Andrew an individually enforceable right to receive special education services. The fact that the District must spend a proportional share of its IDEA funding on the education of disabled students in private school gives him nothing more than a "mere expectation" that he will receive benefits. This is not sufficient to trigger an entitlement to a hearing when his benefits are threatened. [FN7] *See O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 785, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980); *Hoffman v. City of Warwick,* 909 F.2d 608, 619-21 (1st Cir.1990).

> FN7. Although Andrew's parents do not press the point, I also reject any claim that the Special Education Law gives Andrew a protectable property interest in obtaining benefits. The Special Education Law was enacted to implement the IDEA. As the law's current regulations unequivocally establish, it follows the IDEA in not giving the parents of disabled children in private school an individually enforceable right to obtain services. *See* Ed. 1117.03. Thus, state law does not give either Andrew or his parents a protectable property interest in receiving benefits.

4. Free Exercise

Andrew's parents next claim that the IDEA violates their rights under the First Amendment's Free Exercise Clause.

[5] Before 1990, any law that substantially burdened religiously motivated conduct was deemed to violate the First Amendment's Free Exercise Clause unless the law served a compelling state interest. *See, e.g., Hernandez v.*

Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Sherbert v. Verner,* 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The Court substantially limited the scope of these precedents in *Employment Div. Dep't of Human Resources of Ore. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), by exempting most "neutral laws of general applicability" from the compelling interest test. Under current practice, a law ordinarily need not be justified by a compelling interest ***121** if it is "neutral" in that it is not targeted at religiously motivated conduct and "generally applicable" in that it does not selectively burden religious conduct. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532-35, 542-43, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

[6] Andrew's parents accept the District's assertion that the IDEA is a neutral law of general applicability. Nevertheless, they argue that the Act's private school provisions must be justified by a compelling interest because the provisions substantially burden both their constitutional right to freely exercise their religious beliefs and their constitutional right to control Andrew's education. They thus invoke a narrow exception recognized in *Smith* for "hybrid" claims that join a free exercise claim with another constitutional claim. *See Smith,* 494 U.S. at 881-82, 110 S.Ct. 1595.

The *Smith* court developed the hybrid claim exception in an effort to explain several past decisions which invalidated on free exercise grounds laws that appeared to be neutral and generally applicable. *See id.* It has not yet explained, however, how a court should evaluate such claims. Fortunately, the First Circuit has addressed the issue, holding that the exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim. *See Brown v. Hot, Sexy and Safer Productions, Inc.,* 68 F.3d 525, 539 (1st Cir.1995).

Using this test, Andrew's parents have failed to demonstrate that they have a viable hybrid rights claim because, as I have already noted, their substantive due process claim is deficient. [FN8] Accordingly, I deny Andrew's parents' free exercise claim.

> FN8. The District of Columbia Circuit follows *Brown. Henderson v. Kennedy,* 253 F.3d 12, 19 (D.C.Cir.2001). In contrast, the Ninth and Tenth Circuits require only that a plaintiff must make out a "colorable claim" that another constitutional right has been violated. *See Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir.1999); *Swanson v. Guthrie Indep. Sch. Dist. No. 1-4,* 135 F.3d 694, 700 (10th Cir.1998). This distinction is inconsequential in this case because plaintiffs have failed to make out even a colorable claim that they have been deprived of their right to control Andrew's education.

V. *RFRA*

Having failed to state a viable free exercise claim, Andrew's parents seek to restate their argument as an RFRA claim.

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability ... [unless] it demonstrates that application of the burden to the person--(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that government's interest." 42 U.S.C. § 2000bb-1. The Act's stated purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is

substantially burdened." 42 U.S.C. § 2000bb(b). Although the Supreme Court held in *City of Boerne v. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), that Congress exceeded its power under Section 5 of the Fourteenth Amendment in attempting to apply RFRA to the activities of state and local governments., Congress has since amended RFRA to apply only to "federal law and the implementation of that law," 42 U.S.C. § 2000bb-3 (Supp.2002). Thus, RFRA remains a potentially viable foundation for a cause of action challenging the implementation of federal ***122** law by a state actor acting under color of federal law.

[7] To establish a claim under RFRA, Andrew's parents must demonstrate that their inability to obtain a due process hearing substantially burdens their right to practice their Catholic faith. *See* 42 U.S.C.2000bb-1(a). Andrew's parents attempt to satisfy this requirement by citing their beliefs that their "religious faith obligates [them] to educate [their] children in a religious environment that will assist [them] in teaching [their] children about [their] beliefs and practices" and that "[they] must honor these requirements by sending [their] children to Catholic schools when such schools are available to [them] and [they] are able to do so." While I accept the sincerity of these beliefs, they do not establish that the IDEA's private school provisions substantially burden their ability to practice their Catholic faith. As the First Circuit observed in rejecting a similar claim under the Free Exercise Clause, the Catholic faith does not require parents to educate their children in Catholic schools. *See Strout,* 178 F.3d at 65. Thus, the Court concluded, a law which denies educational funding for children who attend sectarian schools does not substantially burden a central tenet of the Catholic faith. *See id.* On this point, the present case is indistinguishable from *Strout.* Accordingly, I deny Andrew's parents' RFRA claim.

B. *The Special Education Law*

Andrew's parents contend that they are entitled to a due process hearing under New Hampshire's Special Education Law. I disagree.

The Special Education Law provides that a parent's right to appeal decisions regarding her child's IEP is "as provided in rules adopted in accordance with RSA 541-A by the State Board of Education." N.H.Rev.Stat. Ann. 186-C:7. When the state hearing officer denied Andrew's parents' request for a due process hearing, the regulations that were then in effect unequivocally required them to pursue their challenge through the state complaint process rather than through a due process hearing. *See* Ed. 1117.03 (1996).

[8] Andrew's parents first contend that I should disregard the current regulations because they are inconsistent with the Special Education Law. They argue that the law gives Andrew an individually enforceable right to obtain special education services and that their right to a due process hearing necessarily flows from Andrew's right to receive services.

I reject this argument because it is based on the incorrect premise that the Special Education Law gives disabled students in private school an individually enforceable right to receive special education services. While the Law gives disabled students an entitlement to attend an approved program to implement their IEPs, *see* N.H.Rev.Stat. Ann. 186-C:9, it does not state whether a local school district satisfies this entitlement by offering special education services to its disabled children in a public school setting. The Department of Education, following the IDEA, has concluded that the Special Education Law does not give

disabled children an individually enforceable right to receive services if their parents enroll them in private school. Because the Department's interpretation is plausible, I defer to its interpretation and reject Andrew's parents' claim that the Special Education Law entitles them to a due process hearing. *See New Hampshire Retirement System v. Sununu,* 126 N.H. 104, 108, 489 A.2d 615 (1985); *N.H. Dep't of Revenue Admin. v. Public Emp. Labor Relations Bd.,* 117 N.H. 976, 977-78, 380 A.2d 1085 (1977).

***123** Andrew's parents next argue that because they made their request for a due process hearing on June 19, 2001, the current regulations which went into effect on July 1, 2001 are inapplicable. They instead claim that the regulations which were in effect when they requested a hearing gave them an entitlement to a hearing. Their argument requires me to determine whether the current regulations should be applied retrospectively to hearing requests that were pending when the regulations went into effect.

The New Hampshire Supreme Court has summarized its jurisprudence regarding the retrospective application of legislation in *In re Wal-Mart Stores,* 145 N.H. 635, 765 A.2d 168 (2000). There, the court stated:

> [W]hen the legislature is silent as to whether a statute should apply prospectively or retrospectively, as is the case here, our interpretation turns on whether the statute affects the parties substantive or procedural rights. When the rights affected by the statute are substantive, there is a presumption of propsectivity. When the statute is remedial or procedural in nature, however, the presumption is reversed, and the statute is usually deemed to apply retroactively to those pending cases which on the effective date of the statute have not yet gone beyond the procedural stage to which the statute pertains. In the final analysis, however, the question of retrospective application rest[s] on

a determination of fundamental fairness, because the underlying purpose of all legislation is to promote justice. *See id.* at 638, 765 A.2d 168 (internal quotation marks and citations omitted).

What is at stake in this case is Andrew's parents' ability to obtain a due process hearing. Because this is a matter of procedure rather than substance, the regulations are subject to a presumption under New Hampshire law that they should apply to all cases in which a request for a hearing was pending when the regulations went into effect. *See id.* While the presumption might be overcome by evidence that it would be fundamentally unfair to apply the regulations retrospectively, Andrew's parents have failed to produce any evidence to support such a contention. Accordingly, I reject their claim that the current regulations are inapplicable.

IV.

For the reasons set forth herein, I grant the District's motion for summary judgment (Doc. No. 11) and deny Andrew's parents' cross motion for summary judgment (Doc. No. 10).

SO ORDERED.

374 F.3d 15

United States Court of Appeals,
First Circuit.

GARY S. and Sylvie S., individually and on behalf of their son Andrew S.,
Plaintiffs, Appellants,
v.
MANCHESTER SCHOOL DISTRICT, Defendant, Appellee.

No. 03-1211.

Heard Nov. 6, 2003.
Decided July 1, 2004.

Background: Parents of disabled child who attended religious elementary school brought action against school district, alleging that provision of fewer services to child than to children attending public school violated Free Exercise Clause, Due Process and Equal Protection Clauses, and Religious Freedom Restoration Act (RFRA). The United States District Court for the District of New Hampshire, Paul J. Barbadoro, Chief District Judge, James R. Muirhead, United States Magistrate Judge, 241 F.Supp.2d 111, granted summary judgment for district, and parents appealed.

Holdings: The Court of Appeals, Levin H. Campbell, Senior Circuit Judge, held that:

(1) district court was not required to apply "compelling interest" test to parents' claim under Free Exercise Clause;

(2) provision of lesser benefits under Individuals with Disabilities Education Act (IDEA) to private school students did not violate Free Exercise Clause;

(3) provision of lesser benefits did not violate RFRA;

(4) equal protection claim was subject only to rational basis review;

(5) provision of lesser benefits did not violate Equal Protection Clause; and

(6) provision of lesser benefits did not violate due process.

Affirmed.

West Headnotes

[1] Constitutional Law k84.5(3)
92k84.5(3)

In determining whether federal government's provision of fewer programs and benefits under IDEA to private school students than to public school students violated free exercise rights of disabled child and his parents, who chose to send their child to religious elementary school, district court was not required to apply "compelling interest" test, since IDEA was neutral law of general applicability. U.S.C.A. Const.Amend. 1; Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[2] Constitutional Law k84.5(3)
92k84.5(3)

[2] Schools k148(2.1)
345k148(2.1)

Federal government's provision of fewer programs and benefits under IDEA to private school students than to public school students did not violate free exercise rights of disabled child and his parents, who chose to send their child to religious elementary school; student was not being deprived of any generally available public benefit, but of benefits earmarked solely for students enrolled in public school. U.S.C.A. Const.Amend. 1; Individuals with Disabilities

Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[3] Constitutional Law k84.5(4.1)
92k84.5(4.1)

[3] Schools k3
345k3

The federal and state governments are entitled to fund programs associated with private schools if they so desire, provided they do not run afoul of the Establishment Clause. U.S.C.A. Const.Amend. 1.

[4] Civil Rights k1069
78k1069

Federal government's provision of fewer programs and benefits under IDEA to private school students than to public school students did not violate Religious Freedom Restoration Act (RFRA) as to disabled child and his parents, who chose to send their child to religious elementary school, as mere non-funding of private secular and religious school programs did not "burden" parents' or child's religion or the free exercise thereof. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; Religious Freedom Restoration Act of 1993, § 3(a), 42 U.S.C.A. § 2000bb-1(a).

[5] Constitutional Law k242.2(5.1)
92k242.2(5.1)

Claim of disabled child and his parents, who chose to send child to religious elementary school, that provision of fewer programs and benefits under IDEA to private school students than to public school students violated Equal Protection

Clause was subject to rational basis review, not strict scrutiny or heightened scrutiny analysis; non-funding of private secular and religious school programs did not significantly interfere with any fundamental right of parents to direct upbringing and education of children under their control. U.S.C.A. Const.Amend. 14; Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[6] Constitutional Law k213.1(1)
92k213.1(1)

If a requirement imposed by a state significantly interferes with the exercise of a fundamental right, it cannot be upheld under the Equal Protection Clause unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law k242.2(5.1)
92k242.2(5.1)

[7] Schools k148(2.1)
345k148(2.1)

Government's provision of fewer programs and benefits under IDEA to private school students than to public school students bore a rational relationship to the furtherance of a legitimate governmental purpose, and thus did not violate Equal Protection Clause as to disabled child and his parents, who chose to send their child to religious elementary school. U.S.C.A. Const.Amend. 14; Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[8] Constitutional Law k211(2)
92k211(2)

The Equal Protection Clause requires that all persons similarly situated should be treated alike, and a legislature has substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. U.S.C.A. Const.Amend. 14.

[9] Schools k148(2.1)
345k148(2.1)

The primary purpose of the IDEA is to guarantee a free and appropriate public education. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

[10] Constitutional Law k278.5(5.1)
92k278.5(5.1)

[10] Schools k148(2.1)
345k148(2.1)

Government's provision of fewer programs and benefits under IDEA to private school students than to public school students did not violate substantive due process rights of disabled child and parents who chose to send child to religious elementary school, as framework did not create an unconstitutional condition, and parents were not forced to forego their religious beliefs or their right to control child's education in order to obtain benefits. U.S.C.A. Const.Amend. 14; Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

***17** Scott F. Johnson with whom Stein, Volinsky & Callaghan, PA was on brief for appellants.

Dean B. Eggert with whom Jennifer L. Murphy and Wadleigh, Starr & Peters, PLLC were on brief for appellee.

Before LIPEZ, Circuit Judge, CAMPBELL and STAHL, Senior Circuit Judges.

LEVIN H. CAMPBELL, Senior Circuit Judge.

Appealing from an adverse judgment of the district court, the parents of Andrew S., a disabled child who is attending a Catholic elementary school, assert that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-87, is unconstitutional as applied to their son. While he, like other disabled children who go to private schools, receives some educational services under federal and state law, he is not entitled by law to the panoply of services available to disabled public school students under the rubric of free and appropriate public education (FAPE), nor to the due process hearing provided to public school students alone. Appellants argue that the difference in treatment of their disabled son, who is attending a religious school, from other disabled students, who are attending public schools, violates the Free Exercise Clause of the First Amendment to the federal constitution, the Due Process and Equal Protection clauses of the federal constitution, and the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1 to -4.

The district court considered these contentions upon cross motions for summary judgment. Rejecting appellants' claims, it granted the appellee Manchester School District's motion for summary judgment and denied summary judgment to appellants. *Gary S. v. Manchester Sch. Dist.*, 241 F.Supp.2d 111, 123 (D.N.H.2003).

On appeal, appellants reiterate their contentions. After carefully considering them, we find ourselves in agreement with the district court. In disposing of this appeal, we are also in substantial accord with much of the reasoning contained in its published Memorandum and Order. *Id.* at 117-123. We see, therefore, no need to go over yet again all of the groundwork covered there. Nor need we restate the background facts already described in detail in the district court's opinion. *Id.* at 113-17. We add, however, at some length, our own analysis of several of the key issues.

I.

[1] Appellants' lead argument on appeal is that the district court erred in determining that the federal law did not violate Andrew's and his parents' free exercise rights under the First Amendment. They reject the district court's assertion that the Supreme Court's decision in *Employment Div. Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), is controlling. *Smith,* according to the district court, exempted most "neutral laws of general applicability" from the compelling interest test. In the district court's view,

> ***18** [A] law ordinarily need not be justified by a compelling interest if it is "neutral" in that it is not targeted at religiously motivated conduct and "generally applicable" in that it does not selectively burden religious conduct. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532-35, 542-43, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Gary S., 241 F.Supp.2d at 120-21.

IDEA and its regulations, the district court says, do not target religiously motivated conduct and is "generally applicable" in that it does not selectively burden religious conduct. For these reasons, and because appellants' First Amendment

claim is not "hybrid," *i.e.* is not linked to a separate constitutional claim, the district court found no violation of free exercise rights. *Id.* We do not disagree.

Appellants reject the district court's analysis. They ask us to read *Smith* as limited to instances of socially harmful or criminal conduct. They point out that *Smith* did not purport to overrule the Supreme Court's holdings in the cases of *Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), and *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In *Hobbie* and *Sherbert,* the complainants were denied unemployment benefits following discharge because of their religiously-based refusal to work on Saturday, complainant's religion's Sabbath. In *Thomas,* the complainant was denied unemployment benefits after discharge based on his religiously-based refusal to help produce armaments. Holding that the denial of a public benefit in these circumstances burdened plaintiff's religion, the Court ruled that, in order to justify an action having such an effect under the free-exercise clause, the government had to demonstrate that the withholding of the benefit served a compelling governmental interest and was the least restrictive means to that end. *Hobbie,* 480 U.S. at 141-45, 107 S.Ct. 1046; *Thomas,* at 718-20, 101 S.Ct. 1425; *Sherbert,* 374 U.S. at 403, 83 S.Ct. 1790. Appellants have likened the denial of educational disability benefits here to those situations, asking us similarly to apply strict scrutiny. If we do, appellants contend, we will find that Andrew's attendance at a Catholic school is mandated by his parents' sincerely-held religious beliefs. No compelling governmental interest is served, they say, by withholding from him the identical benefits granted to his peers at public schools.

It is not always easy to predict what analytical framework the Supreme Court will apply to the various, factually dissimilar free exercise cases that arise. *Smith* rejected a free exercise claim involving the religiously-based use of peyote, an illegal substance. Writing for five of the Justices, Justice Scalia endorsed the constitutionality of neutral, generally applicable laws even when they impinged incidentally upon individual religious practices. *Smith,* 494 U.S. at 881, 885, 110 S.Ct. 1595. The *Smith* majority expressly limited *Hobbie, Thomas* and *Sherbert* to the unemployment compensation field. *Smith,* 494 U.S. at 883-84, 110 S.Ct. 1595. While, as appellants point out, Justice Scalia in *Smith* also distinguished *Hobbie, Thomas* and *Sherbert* on the narrower ground that the use of peyote was illegal, 494 U.S. at 876, 110 S.Ct. 1595, the majority's overall message is unmistakably contrary to appellants' present argument that *Hobbie, Thomas* and *Sherbert*--and, in particular, the "compelling interest" test--are broadly applicable here. *Smith,* insofar as can be told from reading the Court's more recent precedent, remains good law, albeit reflective ***19** when written of the thinking of a narrow majority of justices, some of whom no longer serve. *See, e.g., Watchtower Bible and Tract Soc'y of N.Y. v. Vill. of Stratton,* 536 U.S. 150, 159, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (discussing in dicta that lower court relied on *Smith* standard); *City of Boerne v. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (invalidating statute that sought to "restore the compelling interest test as set forth in *Sherbert v. Verner,* ... and *Wisconsin v. Yoder,*" that had been rejected in *Smith*); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty,* 117 Harv. L.Rev. 1810, 1853 (2004) (describing the "current Smith-Boerne doctrine"); Notes, *"They Drew a Circle That Shut Me In": The Free Exercise Implications of Zelman v. Simmons-Harris,* 117 Harv. L.Rev. 919, 924 (2004) ("Although the *Smith* rule has been criticized by several

Justices--both at the time of the decision and subsequently--the Court has reiterated its commitment to the rule and rebuffed a congressional attempt to change it.") (footnotes omitted); Ming Hsu Chen, Note, *Two Wrongs Make a Right: Hybrid Claims of Discrimination,* 79 N.Y.U.L.Rev. 685, 710 (2004) ("Notwithstanding any of its flaws, [*Smith*] remains good law.").

We also agree, for the reasons the district court stated, that this case is not a "hybrid" one. Hence, we conclude that the district court analyzed the case under the correct standard. *Gary S.,* 241 F.Supp.2d at 121.

[2] While we could perhaps leave the free exercise analysis there, an even more fundamental reason causes us to reject appellants' First Amendment arguments. We cannot accept appellants' contention that providing to all disabled attendees at private schools, both sectarian and secular, fewer benefits than those granted to public school attendees is truly analogous to denying unemployment benefits to persons fired because of their religiously-inspired insistence upon celebrating the Sabbath or not producing weapons.

The state unemployment benefits denied in *Hobbie, Thomas, Sherbert* were public benefits, available to all. Plaintiffs would have received them had their religiously-motivated refusal to work on a certain day or at a certain job not been erroneously viewed by local authorities as misconduct. While appellants say their son's attendance at a Catholic school is likewise a religiously-motivated act, there is a basic difference. He and they are not being deprived of a *generally available* public benefit. Rather, the benefits to which appellants lay claim under the First Amendment are benefits the federal government has earmarked solely for students enrolled in the nation's public schools--benefits still available for Andrew were he sent to a public school, though not

otherwise. Since the early days of public education in this country, public financial aid has commonly been limited to public rather than independent schools. While the parents of private school attendees pay the same taxes as public school parents, the former's tax money normally supports their own children's education only if they transfer them to a public school. To be sure, parents have a protected right to send their children to private schools if they so desire. *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534- 35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (state law compelling public school attendance "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"). But as the very term "private" denotes, it is not ordinarily expected that such schools will be publicly funded, and there is no precedent requiring such funding. *Norwood v. Harrison,* ***20** 413 U.S. 455, 462, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (in affirming "right of private schools to exist and operate ... [*Pierce*] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise."). [FN1]

> FN1. To be sure, the Court has recently permitted a state legislature to provide for attendance at private schools at public expense if it so desires. *Cf. Zelman v. Simmons-Harris,* 536 U.S. 639, 662-63, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Ohio pilot school voucher program in which 96% of participating students in Cleveland received publicly-funded tuition aid to attend religious schools did not violate Establishment Clause). But the voucher approach remains so far the exception rather than the rule in our nation as a whole.

[3] Given the traditional pattern that has so far prevailed of financing public education via the public schools, it would be

unreasonable and inconsistent to premise a free exercise violation upon Congress's mere failure to provide to disabled children attending private religious schools the identical financial and other benefits it confers upon those attending public schools. Unlike unemployment benefits that are equally available to all, private school parents can have no legitimate expectancy that they or their children's schools will receive the same federal or state financial benefits provided to public schools. Thus, the non-receipt of equal funding and programmatic benefits cannot be said to impose any cognizable "burden" upon the religion of those choosing to attend such schools. [FN2] Persons opting to attend private schools, religious or otherwise, must accept the disadvantages as well as any benefits offered by those schools. They cannot insist, as a matter of constitutional right, that the disadvantages be cured by the provision of public funding. It follows that denying the benefits here, to which appellants have no cognizable entitlement, do not burden their free exercise rights.

> FN2. We recognize the disability program provided to Andrew is not one furnished directly by the Catholic school, but is instead run by public authorities for children who attend private school. But we see no distinction in principle. It is, of course, also true that the federal government and state are here actually funding programs for disabled children such as Andrew, the complaint being not the total absence of a program but that Andrew's program and rights are less comprehensive than those accorded to public school students. Again, we see no difference in principle. The federal and state governments are entitled to fund programs associated with private schools if they so desire, provided they do not run afoul of the Establishment Clause. Our point is not

that such funding is never allowed, but that it is not commonly expected in our society nor required.

Indeed, if we were to find a burden here on appellants' right of free exercise, it would follow logically that we should find free exercise violations whenever a state, city or town refuses to fund programs of other types at religious schools, at least insofar as the absence of funding adversely affects students with parents who believe their faith requires attendance at a religious school. [FN3] Yet, as noted *supra,* it is ***21** clear there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis. *See, e.g., Norwood v. Harrison,* 413 U.S. at 462, 93 S.Ct. 2804; *Harris v. McRae,* 448 U.S. 297, 317-18, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Maher v. Roe,* 432 U.S. 464, 477, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *see also Locke,* 124 S.Ct. at 1315; *Strout v. Albanese,* 178 F.3d 57, 66 (1st Cir.1999) (stating, "fundamental right [to direct child's upbringing and education] does not require the state to directly pay for a sectarian education").

FN3. A further anomaly of such a holding would be that only persons such as appellants, with a declared religious belief in the necessity of sending their children to private schools, would be entitled under the First Amendment to the funding sought. Other students, including those in secular private schools, would lack a right to such funding. *Cf. Locke v. Davey,* --- U.S. ----, 124 S.Ct. 1307, 1315, 158 L.Ed.2d 1 (2004) (stating, "Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect. Without a presumption of unconstitutionality, [respondent's] claim must fail.

> The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on [those involved in the funding program]. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the [funding program] as currently operated by the State of Washington.").

Accordingly, we see no basis for holding that the federal government violates appellants' free exercise rights under the First Amendment by favoring disabled public school attendees in respect to IDEA's programs and benefits. In so doing, the federal government does no more than state and local governments do everyday by funding public school programs while providing lesser or, more likely, no funding to private schools, religious and otherwise. This methodology leaves all parents with ultimate recourse to the public schools whenever the balance of services associated with attendance at a private school appears to them to be unsatisfactory; but the option thus available can necessitate their having to choose, as here, between alternatives each of which may seem imperfect. In any event, we cannot say that the federal government's structuring of benefits here violates appellants' free exercise rights.

II.

[4] Our above-stated conclusion that no cognizable burden on religion has been caused by the federal government's failure to provide to disabled children attending Catholic schools the same benefits as it provides to disabled public school children applies with equal force to appellants' RFRA claim. 42 U.S.C. § 2000bb-1(a) (stating in part, "[g]overnment shall not substantially burden a person's

exercise of religion even if the burden results from a rule of general applicability,....").

The district court rejected appellants' RFRA claim, finding no burden upon religion given this court's *Strout* decision that "the Catholic faith does not require parents to educate their children in Catholic schools." *Gary S.*, 241 F.Supp.2d at 122 (citing *Strout*, 178 F.3d at 65). Appellants contend on appeal that it is irrelevant whether the Catholic religion as a whole requires Catholic parents to educate their children at religious schools. They assert that they personally believe, on religious grounds, that such a requirement exists. Their sincere personal belief is enough, they argue, to demonstrate the centrality to their faith of Catholic school attendance. *See Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (stating, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") (citation omitted).

Assuming, without deciding, that appellants' personal religious belief suffices for RFRA purposes, they still face the insurmountable hurdle we have discussed in the previous section, namely that the mere non-funding of private secular and religious school programs does not "burden" a person's religion or the free exercise thereof. 42 U.S.C. § 2000bb-1(a). There ***22** is no need to repeat what we have already said on this point. It suffices to say we find no cognizable "burden" being imposed here upon appellants' exercise of their religion, hence no occasion to apply RFRA.

III.

[5] Likewise, appellants' equal protection claim fails, as the district court ruled. Appellants assert that IDEA has

infringed upon their fundamental right to direct Andrew's upbringing and education [FN4] because it deprives him of FAPE and a due process hearing while offering these benefits to students who receive special education services at public school and, therefore, should be subjected to strict scrutiny. *See Pierce,* 268 U.S. at 534-35, 45 S.Ct. 571.

> FN4. Appellants also argue that the distinctions made here deny their child the right to access an adequate education and a "basic floor of educational opportunity" and therefore should be analyzed under heightened scrutiny. They concede that the Supreme Court found there is no fundamental right to education, but argue that the Court left open the issue of whether the denial of a "minimally adequate education" would be subjected to heightened scrutiny. *See San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). As appellants have failed to provide any precedential example of a court's actually having applied this particular mode of heightened scrutiny analysis, we decline to embark upon this path.

[6] To be sure, if a requirement imposed by a state significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *See, e.g., Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 303, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). Here, however, just as non-funding of private secular and religious school programs does not "burden" a free exercise of religion, it does not significantly interfere with the appellants' fundamental right to direct the upbringing and education of children under their control. *See Pierce,* 268 U.S. at 534-35, 45 S.Ct. 571. The Supreme Court has held "in several contexts that a legislature's decision not

to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); *see also Buckley v. Valeo,* 424 U.S. 1, 143-44, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (declining to apply strict scrutiny to statute that provides federal funds for candidates who enter primary campaigns but does not provide funds for candidates who do not run in party primaries); *Harris,* 448 U.S. at 316-18, 100 S.Ct. 2671 (stating, "although government may not place obstacles in the path of a [person's] exercise ... of freedom of [speech], it need not remove those not of its own creation."); *Maher,* 432 U.S. at 476-77, 97 S.Ct. 2376.

[7][8][9] Accordingly, we apply rational basis scrutiny to the IDEA and conclude, as did the district court, that the statutory classification at issue here between public and private school students bears a rational relationship to the furtherance of a legitimate governmental purpose. *Regan,* 461 U.S. at 547, 103 S.Ct. 1997. The Equal Protection clause requires that all persons "similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). A legislature has "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Plyler v. Doe,* 457 U.S. 202, ***23** 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The primary purpose of the IDEA is to guarantee a free and appropriate *public* education. *See Nieves-Marquez v. Puerto Rico,* 353 F.3d 108, 125 (7th Cir.2003) ("We agree with the reasoning of these courts that IDEA's primary purpose is to ensure FAPE...."); *Polera v. Bd. of Educ.,* 288 F.3d 478, 486 (2d Cir.2002) (stating, "the [IDEA's] administrative system ... is designed to ensure that disabled students receive the free

appropriate public education to which they are entitled...."). Accordingly, the distinctions made here between students in public school as opposed to children who are unilaterally placed in private schools are rational. The burden placed on local educational authorities to make FAPE available is heavy. Congress acted rationally when it chose not to subject local educational authorities to the even greater and perhaps overwhelming responsibility of providing the same services to disabled students enrolled unilaterally in private schools.

IV.

[10] Lastly, we agree with the district court that appellants' substantive due process claim fails. Appellants argue that the federal law requires them to forego their religious beliefs and their right to control their child's education in order to obtain the same right to FAPE and due process that other students who receive special education services at Manchester receive. As appellants allege that the government has attempted to condition access to a government benefit on the relinquishment of a constitutional right, the district court correctly analyzed this claim under the framework of the "unconstitutional conditions" doctrine. The court noted that both the Supreme Court and the First Circuit have "consistently refused to invalidate laws which condition a parent's ability to obtain educational benefits on the parent's relinquishment of her right to send her child to private school." See Norwood, 413 U.S. at 462, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973); Strout, 178 F.3d at 66; Harris, 448 U.S. at 318, 100 S.Ct. 2671; Maher, 432 U.S. at 477, 97 S.Ct. 2376. Moreover, for the reasons stated above, appellants' claim fails because appellants are not forced to forego their religious beliefs or their right to control their child's education in order to obtain these government benefits.

We AFFIRM the decision of the district court.